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In the Supreme Court of the United States

MARILYN ARONS, ET AL., PETITIONERS

v.

OFFICE OF DISCIPLINARY COUNSEL
OF THE SUPREME COURT OF DELAWARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.*, which requires that States afford parties to administrative "due process" hearings "the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities," 20 U.S.C. 1415(h)(1) (Supp. IV 1998), establishes a clear federal right to non-lawyer representation in those proceedings that preempts a contrary state rule against the unauthorized practice of law.

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This brief is submitted in response to the Court's order inviting the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, establishes a cooperative program under which the federal government makes grants to participating States to assist them in providing public education to children with disabilities. See generally 20 U.S.C. 1400(d) (Supp. V 1999) (statement of statutory purposes).[1] Delaware participates in

[1] Congress revised the IDEA extensively in 1997. Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No.

the IDEA program, and must comply with the Act's requirements in the administration of the program within the State. See Pet. App. A2 n.1, A44.

Among other things, the IDEA requires Delaware to provide certain procedures "to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education." 20 U.S.C. 1415(a). Those procedures must include "an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. 1415(b)(6). When such a complaint is made, "the parents involved * * * shall have an opportunity for an impartial due process hearing. " 20 U.S.C. 1415(f)(1). Moreover, at any such hearing each party, including the parents, must be accorded certain rights, including "the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities." 20 U.S.C. 1415(h)(1).

2. Petitioners Arons and Watson are non-lawyers who have "special knowledge or training with respect to the problems of children with disabilities" within the meaning of Section 1415(h)(1). Pet. App. A55. Each of them has appeared with and on behalf of the parents of a disabled child in at least one IDEA "due process hearing" conducted by the Delaware Department of Public Instruction. *Id.* at A2-A3, A49.

105-17, Tit. I, § 101, 111 Stat. 37. Unless otherwise indicated, references in this brief are to the Act as set out in the 1999 Supplement to the United States Code.

Such hearings are held before a three-person panel, chaired by an attorney licensed to practice law in Delaware and including an "educator knowledgeable in the field of special education and special educational programming" and a "lay person with demonstrated interest in the education of the handicapped." Del. Code Ann. tit. 14, § 3137(d)(1)-(3) (1999); see Pet. App. A46. The parties are parents, the local school board, and the State Department of Public Instruction. The matters at issue "typically involve complex factual questions relating to the unique learning needs of the disabled child[,] * * * the adequacy and accuracy of the school board's testing, evaluation, and diagnosis of the child's problem, and the remedial measures needed to address the child's disability." *Id.* at A47. Fact witnesses typically include school officials such as teachers, counselors, and principals, and expert witnesses include neurologists, psychiatrists, psychologists, physicians, and others with special knowledge of educational and developmental matters. *Id.* at A47-A48.

At the hearings that gave rise to this litigation, the local school boards and the Delaware Department of Public Instruction were represented by legal counsel. Pet. App. A46. In each case, parents of a disabled child sought assistance from petitioners because they could not find a lawyer who was willing to handle their case for a fee they could afford to pay. *Id.* at A49-A51. Petitioners accompanied these parents to the IDEA hearings and, on their behalf, "made statements, examined and cross-examined witnesses, raised objections, proffered records and exhibits, and submitted briefs and other documents to the panel." *Id.* at A49. Without petitioners' assistance, none of the parents would

have invoked the right to an IDEA hearing. *Id.* at A50; see *id.* at A50-A51.

3. In August 1996, the Delaware Office of Disciplinary Counsel initiated a proceeding before the Board on the Unauthorized Practice of Law of the Supreme Court of Delaware (the Board), challenging petitioners' practice of representing parents at IDEA hearings. Pet. App. A16. After briefing and argument on stipulated facts, the Board concluded that such representation constituted the practice of law, and that it was unauthorized if performed by persons, like petitioners, who were not admitted to the Delaware bar. See *id.* at A23-A42.

The Board rejected petitioners' argument that their activities were not "unauthorized" under state law because the IDEA supplies federal authorization for qualified non-lawyers to represent parents at IDEA hearings. First, the Board noted the state Supreme Court's traditional jurisdiction over the practice of law within the State. Pet. App. A24-A27. Turning to the language of Section 1415(h)(1), the Board distinguished the Act's provision that parents may be "accompanied and advised" by "individuals with special knowledge or training" from provisions in other statutes that, in the Board's view, used terms such as "agent" or "representative" to express an "inten[tion] to allow *representation* of parties by nonlawyers in administrative or other proceedings." *Id.* at A27 (emphasis added). The Board concluded that the "plain language" of Section 1415(h)(1) does not authorize lay representation, because Congress "used words—'accompanied and advised'—which do not ordinarily convey the concept of representation." *Id.* at A28.

The Board found support for that conclusion in the Act's legislative history, noting a comment in the

Senate Conference Report that a party has a "right to counsel and to be advised and accompanied by individuals with special knowledge, training or skills with respect to the problems of handicapped children." Pet. App. A29 (quoting S. Conf. Rep. No. 455, 94th Cong., 1st Sess. (1975)). In the Board's view, that language "confirm[ed] the clear distinction between the representational role of counsel and the advisory role of nonlawyers." *Ibid.* The Board also drew support from the reasoning of the Third Circuit in *Arons* v. *New Jersey State Board of Education*, 842 F.2d 58, cert. denied, 488 U.S. 942 (1988), which upheld a scheme under which New Jersey permitted certain non-lawyers to represent parents at IDEA hearings, but prohibited non-lawyers from receiving fees for such representation. See Pet. App. A29-A31.

The Board refused to defer to the contrary position of the United States Department of Education, set out in a 1981 opinion letter. Pet. App. A31-A35; see App., *infra*, 1a-12a (reprinting opinion letter). The Board first reasoned that there was no room for deference because "[t]he usage of the phrase 'accompanied and advised' rather than the term 'represented' or words of similar import," in the context of Section 1415(h)(1), established unambiguously that "Congress did not intend to mandate a right to lay representation." Pet. App. A32-A33. In any event, the Board concluded that the position adopted by the Secretary of Education was not a "'reasonable' administrative interpretation," *id.* at A33, because the Secretary "overlooked the inherent and presumptive representational authority with which counsel are cloaked," and which "nonlawyers simply do not share," *id.* at A34; relied on different legislative history from that found persuasive by the Board, *id.* at A34-A35; and drew a conclusion different from that

drawn by the Board from the fact that Congress had authorized lay representation in various other administrative proceedings, *id.* at A35.

Finally, the Board rejected petitioners' related argument that the Delaware prohibition on lay representation was preempted by virtue of a conflict with federal law. Pet. App. A36-A41. The Board noted that "regulation of the practice of law is a traditional State function," and reasoned that it could "find preemption of this area * * * only if [it could] conclude that preemption was the 'manifest intent' of Congress." *Id.* at A38-A39; see also *id.* at A37. Based on its statutory analysis, the Board perceived no actual conflict between the Delaware rule and Section 1415(h)(1). *Id.* at A39. The Board did "recognize the force of [petitioners'] contention that representation of families of children with disabilities by laypersons * * * could serve the accomplishment of the full objectives of Congress under IDEA," particularly in light of a record showing that the families represented by petitioners "were unable to find attorneys who would agree to represent them on a standard fee-for-service basis, a low-cost basis or pro bono." *Id.* at A39-A40. It concluded, however, that "[t]he absence of a universe of low cost or pro bono attorneys willing to take on [IDEA] cases" did not "demonstrate that the purpose and objectives of Congress are impeded by the [State's] traditional prohibition of legal representation of parties by persons untrained in the law." *Id.* at A40.

4. The Supreme Court of Delaware affirmed. Pet. App. A1-A15. At the outset, the court rejected the parties' respective contentions that the plain language of Section 1415(h)(1) compelled resolution of the preemption issue one way or the other. *Id.* at A5-A6. The court concluded, to the contrary, that the statutory

provision "is ambiguous to the extent it appears to confer joint authority on lawyers and non-lawyers to accompany and advise parents" in IDEA "due process" hearings. *Id.* at A6.

In interpreting that ambiguous provision, the court looked first to the Third Circuit's opinion in *Arons* v. *New Jersey State Board of Education*, *supra*. Pet. App. A6-A8. It quoted with approval the Third Circuit's observations that the IDEA does not specifically refer to lay advocates presenting evidence or performing other specific representational functions, that it does not use the word "represent," and that the court of appeals' "search through the legislative history ha[d] failed to uncover any indication that Congress contemplated that the 'individuals with special knowledge' [referred to in the Act] would act in a representative capacity." *Id.* at A6-A7 (quoting *Arons*, 842 F.2d at 62-63).

Turning to federal legislative materials, the Supreme Court noted a Senate Report that described the lay advocate's role as one of "consultation," which the court regarded as "compelling evidence that Congress did not intend non-lawyers to advocate on behalf of parents in due process hearings." Pet. App. A8. The court concluded that statements in a Conference Report and in floor debate, to the effect that parents would have "'the right to counsel and to be advised and accompanied by individuals with special knowledge,'" "confirm[ed] the clear distinction that Congress envisioned between the representational role of counsel and the advisory role of non-lawyers." *Ibid.* (in part quoting S. Conf. Rep. No. 455, *supra*, and 121 Cong. Rec. 37,416 (1975) (statement of Sen. Williams)).

The court adverted to Congress's later amendment of Section 1415(b)(7) to require that notice of an IDEA

complaint be given by "the parent of a child with a disability, or the attorney representing the child," which the court believed provided further support for the argument that the Act does not contemplate lay representation of parents at IDEA hearings. Pet. App. A8-A9. It noted also that Congress had not amended the Act in response to the Third Circuit's decision in *Arons*. *Id.* at A9. In addition, the court agreed with the Board that Congress's "explicit[] inclu[sion of] language in other federal statutes to permit lay representation" showed that Congress "knows how to provide such authority when it wishes to do so," and "strongly suggests that Congress chose not to create a right to lay representation in [IDEA] due process hearings." *Ibid.*

The Supreme Court acknowledged (Pet. App. A10-A11) that it owed "some level of deference" to the interpretation of Section 1415(h)(1) adopted by the Secretary of Education, as set out both in the 1981 opinion letter and in an amicus curiae brief filed with the court in this case (see *id.* at A5). In the court's view, however, the degree of deference required was "modest," because deference was "due only to a 'reasonable' administrative interpretation," and because "less deference is due to informal agency interpretations, such as that expressed in the [1981 opinion] letter, than to formal agency regulations adopted after a notice and comment period." *Id.* at A11. In any event, although it never actually declared that the Secretary's interpretation was incorrect or unreasonable, the court did not defer to that interpretation. Observing, instead, that the Secretary's analysis was "subject to criticism" (*ibid.*), the court concluded that "the language of section 1415(h)(1) cannot be interpreted as granting any clear right to lay representation." *Id.* at A15. Because that

conclusion, in the court's view, "render[ed] moot [petitioners'] claim that the IDEA preempts any state-law proscription against the unauthorized practice of law," the court affirmed the Board's decision that petitioners must cease and desist from representing the parents of children with disabilities at IDEA hearings. *Ibid.*

Finally, the Supreme Court addressed (Pet. App. A12-A15) an argument, advanced by petitioners in that court, that in view of the apparent lack of affordable legal representation available to parents in IDEA administrative proceedings, "due process would be violated by forbidding parents from having non-lawyer representation" (*id.* at A12). In rejecting that contention, the court indicated that it was not persuaded on the record before it that denial of lay representation would deprive many parents of "the only assistance available to them" in IDEA hearings. *Id.* at A14. The court observed, however, that "[i]f it could be demonstrated that an unmet need exists and that the local bar could not adequately respond, th[e] Court would consider the adoption of a rule allowing lay representation in a certain limited class of cases." *Id.* at A15.

DISCUSSION

1. The IDEA was enacted "to ensure that all children with disabilities have available to them a free appropriate public education," and in that process "to ensure that the rights of children with disabilities and parents of such children are protected." 20 U.S.C. 1400(d)(1)(A)-(B). Although the Act is built on a cooperative model that "emphasizes the participation of the parents in developing the child's educational program and assessing its effectiveness," Congress "recogniz[ed] that this cooperative approach would not always produce a consensus between the school officials and the

parents, and that in any disputes the school officials would have a natural advantage." *Burlington Sch. Comm.* v. *Massachusetts Dep't of Educ.*, 471 U.S. 359, 368 (1985). Accordingly, in framing the Act, "Congress incorporated an elaborate set of * * * 'procedural safeguards' to insure the full participation of the parents and proper resolution of substantive disagreements." *Ibid.*; see also, *e.g.*, *Hendrick Hudson Dist. Bd. of Educ.* v. *Rowley*, 458 U.S. 176, 205-206 (1982) ("It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process * * * as it did upon the measurement of the resulting [individualized educational program] against a substantive standard.").

IDEA "due process" hearings of the sort at issue here are a critical component of the Act's "procedural safeguards." See *Burlington*, 471 U.S. at 369. The Act provides that, at such hearings, the parents of a disabled child have "the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities." 20 U.S.C. 1415(h)(1). Since 1981, the Secretary of Education has interpreted that language to require States that receive funds under the IDEA to allow qualified non-lawyers to represent parents at IDEA due process hearings. See App., *infra*, 1a-12a .

As amicus curiae in the Delaware Supreme Court, the United States argued that the IDEA's language and structure support the Secretary's position. See U.S. Amicus Br. 15-24; cf. Pet. App. A6. In conferring on parents the right to be "accompanied and advised" at such hearings, Section 1415(h)(1) applies those terms

equally to "counsel" and to "individuals with special knowledge or training" in the area. There is, moreover, no dispute that the Act authorizes parents to represent themselves (according them, for example, the right to "present evidence and confront [and] cross-examine * * * witnesses," 20 U.S.C. 1415(h)(2)), and that it authorizes lay experts to "accompan[y]" parents to such hearings and to "advise[]" them step-by-step on how to proceed. In view of those provisions, it makes little sense to read the Act to permit participating States to require parents who do not have a lawyer to use "a clearly wasteful, time-consuming, and imprecise process whereby the expert's questions and evidence are funneled through parents" acting pro se, simply because the Act uses the word "advised" rather than the word "represented." U.S. Amicus Br. 4; see Pet. App. A6-A7.

The Delaware Supreme Court focused on lawyers' traditional role in providing "representation" in adversary proceedings, and posited a "clear distinction that Congress envisioned between the representational role of counsel and the advisory role of non-lawyers." Pet. App. A8; see *id.* at A3-A4, A6-A9. Lawyers, however, also traditionally "accompan[y] and advise[]" (or provide "counsel") to their clients, in both adversary and non-adversary settings. The court did not suggest that petitioners would be engaging in the unauthorized practice of law if they provided parents with detailed advice concerning their rights under the IDEA and the procedures available for protecting those rights, or if they assisted parents in negotiating with school officials concerning what types of assistance would be appropriate for their disabled children. Yet such advice or assistance might equally, and perhaps more traditionally, be provided by a lawyer. The terms used in

Section 1415(h)(1) do not by themselves readily communicate any "clear distinction" in roles between lawyer and non-lawyer "advise[rs]."

Indeed, the Supreme Court of Delaware acknowledged that the language of the IDEA was at least "ambiguous" in this regard. Pet. App. A6 (noting that the Act "appears to confer joint authority on lawyers and non-lawyers to accompany and advise parents * * * [at] due process hearings"). The court also acknowledged that, in view of that ambiguity, it owed at least "some level of deference" to the Secretary of Education's interpretation of the Act. *Id.* at A10-A11 (citing *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-845 (1984)). In fact, however, the court neither deferred to the Secretary's interpretation, nor explained why that interpretation was not "a permissible construction of the statute." 467 U.S. at 843. The court's summary analysis (Pet. App. A11-A12) and its observation that the Secretary's position is "subject to criticism" (*id.* at A11) do not adequately justify the court's decision, which effectively "substitute[s] its own construction of a statutory provision for a reasonable interpretation made by the [Secretary]." *Chevron*, 467 U.S. at 844.[2]

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[2] See *Chevron*, 467 U.S. at 843 n.11 ("The court need not conclude that the agency construction was the only one it permissibly could have adopted * * *, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."); see also, *e.g.*, *Your Home Visiting Nurse Servs., Inc.* v. *Shalala*, 525 U.S. 449, 453 (1999) (deference to Secretary's reading of statutory provision is required where the construction is "within the bounds of reasonable interpretation"); *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997) (deferring to agency's interpretation of its regulation, expressed in legal brief); *NationsBank of N.C., N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995)

2. Nonetheless, the question of federal authorization of lay representation in IDEA hearings does not warrant this Court's review at the present time.

a. The Delaware Supreme Court is the first court to have squarely addressed whether Section 1415(h)(1) creates a federal right of lay representation at IDEA hearings. While two federal courts of appeals have touched on the question, in each case the issue presented was not whether federal law compels a state to permit a lay representative to appear in an IDEA hearing, but whether, if such a representative appears, federal law authorizes an award of attorney's fees. Thus, in *Z.A.* v. *San Bruno Park School District*, 165 F.3d 1273 (9th Cir. 1999), the court noted (*id.* at 1275-1276), in passing, that a lawyer not admitted to the bar in California "could only appear at [a California IDEA] hearing in a nonlawyer advisor capacity," citing both 20 U.S.C. 1415(d)(1) (1994) (now Section 1415(h)(1)) and an identically worded provision of the California Education Code. However, the issue before the court was "whether a lawyer who prevails in a state administrative proceeding must be admitted to the [state] bar in order to collect attorney's fees under the IDEA," 165 F.3d at 1275, and the court held (*id.* at 1276) that admission was required in order to collect such fees.

Likewise, the Third Circuit's decision in *Arons* v. *New Jersey State Board of Education*, 842 F.2d 58, 61-63, cert. denied, 488 U.S. 942 (1988), involved only the availability of attorney's fees, because state law

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(deferring to statutory interpretation advanced in letter granting Comptroller of the Currency's permission for bank to engage in certain activities); but see *Christensen* v. *Harris County*, 529 U.S. 576, 586-588 (2000) (declining to accord full *Chevron* deference to interpretation set out in agency opinion letter).

expressly permitted lay representation. See *id.* at 60, 62.[3] In any event, to the extent the *Arons* opinion included language relevant to the question of whether Section 1415(h)(1) authorizes lay representation (as opposed to mandating payment for such representation), the Third Circuit's analysis was consistent with that of the Delaware Supreme Court in this case. See Pet. App. A6-A7 (quoting and relying on *Arons*), A9. Accordingly, the Delaware Supreme Court's decision does not create any judicial conflict that requires resolution by this Court.[4]

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[3] It appears that *Arons*' statements that state law authorized lay representation may have been over-simplified. A later district court decision notes that at the time *Arons* was decided, New Jersey permitted lay representation only on the theory that it was "required by federal statute or regulation." *Woods* v. *New Jersey Dep't of Educ.*, 858 F. Supp. 51, 53 n.4 (D.N.J. 1993). *Woods* also explains, however, that after *Arons* the applicable state court rules were amended specifically to permit lay representation in IDEA hearings, even in the absence of any federal mandate to that effect. *Ibid.* In any event, the Third Circuit's analysis in *Arons* proceeded from the premise that state law authorized lay representation without regard to federal law. See also *Connors* v. *Mills*, 34 F. Supp.2d 795, 806-808 (N.D.N.Y. 1998) (concluding that New York law provides for lay advocacy at IDEA hearings, but rejecting payment of attorney's fees to non-lawyers "[i]n the absence of affirmative state action in promulgating regulations that govern the training and conduct of lay advocates").

[4] Cf. *Collingsgru* v. *Palmyra Bd. of Educ.*, 161 F.3d 225, 230-237 (3d Cir. 1998) (although the IDEA gives parents themselves the right to represent their children in administrative hearings, it confers no right to proceed in federal court without a lawyer); *Devine* v. *Indian River County Sch. Bd.*, 121 F.3d 576, 581-582 (11th Cir. 1997) (same), cert. denied, 522 U.S. 1110 (1998); *Doe* v. *Board of Educ.*, 165 F.3d 260 (4th Cir. 1998) (refusing to award fees to attorney parent who represented child in court proceeding under the IDEA), cert. denied, 526 U.S. 1159 (1999).

b. The practical significance of this case is not yet clear. The Delaware Supreme Court's decision applies, of course, only in that State, and petitioners represent (Reply Br. 3) that all other States have, at least until now, permitted non-lawyer representation at IDEA hearings. Unless other States decide both to follow Delaware's lead as a matter of state law and to adopt its interpretation of federal law, the decision in this case will have little national significance.

Within Delaware itself, the issue of lay representation at IDEA hearings is likely to arise in only a small number of cases. The State's IDEA program provided benefits to over 16,000 children and young adults (ages 3-21) in the 1998-1999 school year. U.S. Dep't of Educ., *Twenty-Second Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act* A1 (Table AA1) (2000). The Delaware Department of Education informs us, however, that in a seven-year period from 1989 through 1996—the year that unauthorized practice proceedings were commenced against petitioners, see Pet. App. A43—the State received, on average, between eight and nine requests for IDEA hearings each year, and a hearing was ultimately required in an average of only three such cases per year. Those figures are open to interpretation: The small number of requested hearings could reflect the inadequacy of the representation available to aggrieved families, as much as or rather than the successful functioning of the Act's ideally "cooperative approach." *Burlington*, 471 U.S. at 368; see Pet. App. A50-A51. Nonetheless, they suggest that the practical problem created by the state Supreme Court's decision is, for the moment, limited in scope.

Where a hearing is held, moreover, the Delaware Supreme Court's decision does not purport to preclude

qualified non-lawyers from accompanying parents and providing them with advice and guidance. It prohibits them only from engaging directly in the sort of specific representational activities—such as "making opening statements, examining and cross-examining witnesses, [and] making and arguing evidentiary objections," Pet. App. A23 (Board opinion), A49 (stipulation)—that the State has determined constitute the practice of law. Cf. *id.* at A8 (distinguishing between consultation or advice and advocacy or representation). While indirect assistance will never be an ideal way to help parents protect their own and their children's interests, it will sometimes suffice.

Finally, the Supreme Court's opinion indicates that the court is prepared to consider whether existing mechanisms are sufficient to meet the need for representation on behalf of children with disabilities and their parents. See Pet. App. A13-A15; see also *id.* at A41 (Board's opinion) ("[Petitioners] and [the state Office of Disciplinary Counsel] agree that [nonlawyer representation] is an issue that should be addressed, but it must be addressed to the proper body with rule-making authority[.]"). This case was argued and decided on the basis of stipulated facts. See *id.* at A43-A57 (stipulation and amendment). Although the stipulation identifies only one legal services organization that has provided counsel at IDEA hearings, *id.* at A55, and strongly suggests that there is an unmet need for free or low-cost representation at such hearings, see *id.* at A49-A51, the Supreme Court concluded that the record before it did not support petitioners' contention that the court's decision concerning lay representation would deny "parents and children * * * 'the only assistance available to them.'" *Id.* at A14.

The court expressly stated, however, that "[i]f it could be demonstrated that an unmet need exists and that the local bar could not adequately respond, th[e] Court would consider the adoption of a rule allowing lay representation" in appropriate cases. Pet. App. A15. Accordingly, to the extent the Delaware Supreme Court's decision does have an adverse practical effect in Delaware, the court has indicated a willingness to reconsider its decision. It is possible, therefore, that Delaware will, in the reasonably near term, either provide for the availability of free or low-cost legal assistance with IDEA hearings, or bring its law back into conformity with that of other States by adopting an appropriate express exception to its present legal practice rules. Cf., *e.g.*, *Woods* v. *New Jersey Dep't of Educ.*, 858 F. Supp. 51, 53 n.4 (D.N.J. 1993) (discussed in note 3, *supra*). In this respect as in those discussed above, review of the question presented in this case would be premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

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U.S. DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

April 8, 1981

OFFICE OF THE
GENERAL COUNSEL

The Honorable Frank B. Brouillet
Superintendent of Public Instruction
7510 Armstrong Street, S.W.
Tumwater, Washington 98504

Dear Superintendent Brouillet:

Pursuant to Mr. Steven Minter's letter of November 5, 1980 to you, this letter provides a legal analysis regarding the role of lay advocates in educational agency administrative hearings and appeals conducted under Part B of the Education of the Handicapped Act, as amended, 20 U.S.C. 1411 *et seq.* (EHA).

I. AS A CONDITION FOR FUNDING UNDER THE EHA A STATE MUST COMPLY WITH FEDERAL REQUIREMENTS

The EHA authorizes federal financial assistance to states meeting the conditions set forth in the Act. 20 U.S.C. 1411, 1412, 1420. Each state must submit for federal approval a plan for the operation of the program within the state which indicates that the program is being administered in accordance with the applicable statutory and regulatory requirements. 20 U.S.C. 1413. See also 34 C.F.R. 300.110; 300.111. Once a state chooses to participate and receive financial assistance, the state must comply with the provisions of the EHA and its implementing regulations, 34 C.F.R. Part 300. As the Third Circuit Court of Appeals stated in *Battle* v. *Commonwealth of Pennsylvania*, 629 F.2d 269, 272 (3rd. Cir. 1980) the EHA "establishes a program of cooperative federalism which sets requirements which must be complied within order for states to receive financial assistance." The principle that acceptance of assistance under a grant program obligates a state to meet the requirements of the enabling federal statute even where state law, regulation or policy provides otherwise is firmly established.

In *King* v. *Smith*, 392 U.S. 309 (1968), the Supreme Court, in discussing the AFDC program, stated:

> There is of course no question that the Federal Government, unless barred by some controlling constitutional prohibition, may impose the terms and conditions upon which its money allotments to the States shall be disbursed, and that any state law or regulation inconsistent with such federal terms and

> conditions is to that extent invalid. 392 U.S. 333, note 34.

See also *Rosado* v. *Wyman*, 397 U.S. 397, 421-423 (1970) and *Van Lare* v. *Hurley*, 421 U.S. 338, 340 (1975) ("states that seek to qualify for AFDC funding must operate a program not in conflict with the Social Security Act"). *Townsend* v. *Swank*, 404 U.S. 282, 286 (1971) establishes that "a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause." See also *Carleson* v. *Remillard*, 406 U.S. 598, 600-601 (1972) and *Miller* v. *Youakim*, 440 U.S. 125, 132 (1979) (a state foster case scheme inconsistent with the Social Security Act is invalid under the Supremacy Clause).[5]

The principles enunciated above are equally applicable to the EHA financial assistance program. In finding state due process procedures inconsistent with the guarantees of 20 U.S.C. 1415 the court in *Monahan* v. *Nebraska*, 491 F. Supp. 1074 (D. Neb. 1980) stated:

> The Education of All Handicapped Children Act provides specific procedural safeguards which must be adopted by states receiving funds under the Act. These safeguards govern educational proceedings in

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[5] Several other courts have stated that Congress may condition the grant of federal monies upon a state's fulfillment of federal requirements, and that once a state elects to participate, it must meet such requirements. *Page* v. *Preisser*, 585 F.2d 336, 341 (8th Cir. 1978); *Bourgeois* v. *Stevens*, 532 F.2d 799, 802 (1st Cir. 1976); *Florida* v. *Mathews*, 526 F.2d 319, 326 (5th Cir. 1976); *Connecticut State Department of Public Welfare* v. *Department of Health, Education and Welfare, Social and Rehabilitation Service*, 448 F.2d 209, 215 (2nd Cir. 1971).

> Nebraska, since it is a recipient of funds under the Act. Thus, any Nebraska law which is inconsistent with these federally mandated procedures is superseded by the federal law. 491 F. Supp. 1091.

In *Vogel* v. *School Board of Montrose R-14 School District*, 491 F. Supp. 989, 993 (W.D. Mo. 1980) the court held that "whenever a conflict exists between the procedural safeguards mandated by 20 U.S.C. § 1415 and state law the applicable federal law is controlling." See also *Stuart* v. *Nappi*, 443 F. Supp. 1235 (D. Conn. 1978).

II. A STATE THAT FAILS TO MEET EHA REQUIREMENTS MAY BE DISQUALIFIED FROM RECEIVING FEDERAL FINANCIAL ASSISTANCE

Under 20 U.S.C. 1413(c) the Secretary of Education is required to approve a state plan which meets the requirements of 20 U.S.C. 1413(a) and (b) and which is submitted by a state eligible in accordance with 20 U.S.C. 1412. A state plan not meeting these criteria must be disapproved, and in such an instance federal grant money would not forthcoming.

In addition, failure by a state educational agency to comply substantially with 20 U.S.C. 1412 may result in withholding of federal financial assistance. 20 U.S.C. 1416.

Section 1412(5) of Title 20, United States Code, requires that in order to qualify for financial assistance a state must demonstrate that it "has established . . . procedural safeguards as required by section 1415 . . . ." See also 34 C.F.R. 300.131. Section 1415(d)(1) provides that in administrative due process hearings and appeals conducted pursuant to the EHA any party shall be

accorded "the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children .... Consequently, a state's compliance with 20 U.S.C. 1415(d)(1) is a condition to its receipt of EHA assistance.

III. THE REQUIREMENT OF 20 U.S.C. 1415(d)(1)

The remaining issue concerns the meaning of the requirement that a party to an educational agency administrative hearing or appeal be accorded "the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children." 20 U.S.C. 1415(d)(1).[6] See also 34 C.F.R. 300.508(a)(1).

In considering this issue, we have examined what we understand to be your argument that Congress did not intend to permit actual representation by lay advocates at due process hearings. As we understand it, this argument relies on a sentence in the Conference Report accompanying P.L. 94-142 stating that in administrative due process hearings a party shall be "accorded (1) the

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[6] Satisfying the 42 U.S.C. 1415(d)(1) requirement would render a state in compliance with the due process requirement of Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794. Section 504 is a broadly-phrased statute prohibiting discrimination on the basis of handicap in programs or activities receiving federal financial assistance. The regulations implementing Section 504 mandate that recipients operating a public elementary or secondary education program establish and implement a system of procedural safeguards for handicapped persons including an impartial hearing with opportunity for participation by the person's parents and representation by counsel. The regulation goes on to indicate, however, that "compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement." 34 C.F.R. 104.36.

right to counsel and to be advised and accompanied by individuals with special knowledge, training or skills with respect to the problems of handicapped children . . . ." S. REP. NO. 455, 94th Cong., 1st Sess. 49 (1975) *reprinted in* (1975) U.S. CODE CONG. & AD. NEWS, 1425, 1503 (see page 9 of Declaratory Ruling 1-80, issued June 5, 1980 and later rescinded). In addition, your August 19, 1980, letter to Secretary Hufstedler, when read in conjunction with Dr. Martin's letter of August 14, 1980, addressed to you, appears to suggest that the absence of the word "represented" in the EHA, and the usage of the words "accompanied and advised", indicates that the issue of representation was never addressed by the EHA and consequently is a matter for state determination.

For the following reasons, we are not persuaded that this is the correct view of the law, and believe that under the EHA lay advocates are permitted to represent parties at administrative hearings and appeals.

First, the statute does not on its face distinguish between counsel and persons with "special knowledge or training" in the field of handicapped children with respect to their involvement at administrative hearings. No bifurcation of function is set forth in the statute. It appears clear from the statutory language alone that Congress contemplated that lay advocates, as well as attorneys, be permitted to play a role at such hearings, and did not distinguish between lawyers and lay persons in defining that role.

Moreover, we believe the legislative history of EHA-B supports the proposition that attorneys and lay advocates may engage in the same activities at administrative hearings and appeals. The quotation from the P.L. 94-142 Conference Report cited in the Declaratory

Ruling is not unambiguous itself, and the construction given it in the Declaratory Ruling is not supported by other legislative history.

Section 1415(d)(1) was included in H.R. 7217 as passed by the House. 121 CONG. REC. 25547 (1975).[7] Congressman Miller of California, largely responsible for developing the impartial due process provisions of section 1415 [see 121 CONG. REC. 37025, 37027 (1975)], did not distinguish between the role played by attorneys or lay advocates but rather stated that "the complainants will have the right to be accompanied by counsel or other qualified individuals who possess 'special knowledge or training with respect to the education of handicapped children'," 121 CONG. REC. 25539 (1975).

Senator Cranston, in complimenting Representative Miller on his work, noted that the "procedural requirements . . . are consistent with the existing California statutory and master plan requirements on this subject." 121 CONG. REC. 37418-9 (1975). Prior to and during the time P.L. 94-142 was under consideration and ultimately passed by Congress the California statute concerning educational services for children with exceptional needs provided that parents disagreeing with the findings of local educational assessors regarding placement or services offered to the child had the right to request a hearing before local educational authorities. At these hearings the parent had the right "to represent himself or herself, or to select a repre-

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[7] The Senate predecessor to P.L. 94-142, S.6, as passed by the Senate, 121 CONG. REC. 19506, 19508 (1975) did not contain a comparable provision. Technically, the House passed S.6 but struck all but the enacting clause of S.6 and inserted the provisions of H.R. 7217.

sentative . . . ." See Assembly Bill No. 4040, Chapter 1532, Section 7022.2(c), filed with California Secretary of State, September 27, 1974.[8] There was no requirement that the representative be an attorney, nor were any functions reserved to attorneys at such hearings. We have consulted with the legal office of the California state educational agency and that office confirms that lay advocates represented parents in hearings prior to the passage of P.L. 94-142.

Finally, the House Report accompanying H.R. 7217, H. REP. NO. 332, 94th Cong., 1st Sess. 32 (1975), makes no mention of the right to counsel but simply states that persons participating in due process hearings "may be accompanied and advised by counsel and by individuals with special knowledge regarding the problems of handicapped children."

In light of the above, and in the absence of any evidence that the Congress intended to limit the role of lay advocates at administrative hearings and appeals conducted pursuant to the requirements of EHA-B, we believe that attorneys and lay advocates may perform the same functions at such hearings.

Provision for lay advocates in federal regulation is not unprecedented. Lay advocates are permitted to represent parties at several different kind of federally mandated administrative hearings conducted by state or local authorities. For example, under the Food Stamp Program an aggrieved household entitled to a fair hearing at the state and local level may "present the case or have it presented by a legal counsel or other person." 7 C.F.R. 273.15(p)(2). A state plan under Title

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[8] Parents were also permitted access to school records, the right to present evidence, and the right to call witnesses.

I, IV-A, X, XIV or XVI of the Social Security Act must provide for hearings at the state or local level at which an applicant or recipient "may be represented by an authorized representative, such as legal counsel, relative, friend, or other spokesman . . ." 45 C.F.R. 205.10(a)(3)(iii). Representation by lay advocates at federal hearings is commonplace.[9]

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[9] A party to a proceeding before the Social Security Administration to determine eligibility for Old Age, Survivors, or Disability Insurance is afforded the opportunity to be represented by an attorney or another individual qualified under the regulations to act as a representative. 20 C.F.R. 404.971, 972. Regulations implementing the Supplemental Security Income for the Aged, Blind and Disabled and Medicare programs expressly give a claimant the right to "appoint as his representative" in federal administrative proceedings either an attorney or a person other than an attorney qualified under the regulations. 20 C.F.R. 416.1501, 1503; 42 C.F.R. 405.870, 871. Under 20 C.F.R. 410.684, 685 the same is true in Social Security Administration hearings conducted to determine entitlement to benefits under Part B of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended. The Employment Standards Administration of the Department of Labor permits representation by attorneys or non-attorneys at hearings conducted pursuant to the Longshoremen's And Harbor Workers' Compensation Act and Part C of Title IV of the Federal Mine Safety and Health Act, as amended. 20 C.F.R. 702.131, 334; 20 C.F.R. 725.362, 363. In none of the administrative hearings described above is any distinction made between the role played by attorneys or non-attorneys. 20 C.F.R. 404.973; 20 C.F.R. 416.1505; 42 C.F.R. 405.872; 20 C.F.R. 410.686; 20 C.F.R. 725.364. The Veterans Administration "may recognize any individual as an agent or attorney for the preparation, presentation, and prosecution of claims under laws administered by the Veterans' Administration." 38 U.S.C. 3404(a). See also 38 U.S.C. 3403 and 4005(b)(2), and 38 C.F.R. 14.626-631.

State laws regarding the unauthorized practice of law may not govern who appears as a representative in such proceedings. See *Sperry* v. *Florida ex rel. Florida Bar*, 373 U.S. 379 (1963) in which

While of course each federal grant program administered by the states must be evaluated according to the particular statute and regulations under which the program is authorized, the fact that lay representation before administrative agencies is not an unusual practice does tend to support the view that Congress intended to allow such representation at hearings conducted pursuant to the EHA. There is no reason to believe that Congress intended to restrict representa-

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the state sought to enjoin a non-lawyer authorized by federal statute to practice before the United States Patent Office from practicing in Florida because he did not have a law license. The court rejected Florida's argument that it had authority to enjoin in that instance. While noting that under Florida law the preparation and prosecution of patent applications for others constituted the practice of law, and that Florida had a substantial interest in regulating the practice of law within the state, the Supreme Court held that by virtue of the Supremacy Clause the state law must yield when incompatible with federal legislation:

> A State may not enforce licensing requirements which, though valid in the absence of federal regulation, give "the State's licensing board a virtual power of review over the federal determination" that a person or agency is qualified and entitled to perform certain functions, or which impose upon the performance of activity sanctioned by federal license additional conditions not contemplated by Congress. "No State law can hinder or obstruct the free use of a license granted under an Act of Congress." *Pennsylvania* v. *Wheeling & B. Bridge Co.*, 13 How. 518, 566. 373 U.S. 385 (footnotes omitted).

The Court stated that Florida could maintain control over the practice of law within its borders "except to the limited extent necessary for the accomplishment of the federal objectives" 373 U.S. 402 (footnote omitted), and noted that the authority of Congress is no less when the State power displaced is exercised by the state judiciary rather than the state legislature. 373 U.S. 403. See also *Silverman* v. *State Bar of Texas*, 405 F.2d 410 (5th Cir. 1968).

tion at EHA hearings and appeals to attorneys, rather than allowing for the widest possible advocacy.[10]

The state of Washington may of course regulate the practice of law within the state but the state's policy must not conflict with the EHA if Washington is to receive funding under the statute. Whether an actual amendment to state law is necessary in order to allow representation by lay advocates at administrative hearings and appeals conducted pursuant to the EHA is strictly a matter for the state to decide. Our only concern is that WAC 392171-510 appears to prohibit lay advocates from representing parties at such hearings in violation of federal requirements.

In reviewing WAC during the preparation of the analysis we noted that under WAC 1-08-005 each agency may adopt its own rules of practice and procedure, including regulating who may appear and practice before an agency, and further noted that representation by lay advocates is in fact permitted before certain other Washington state agencies. For instance, in public assistance hearings an appellant may be "represented by legal counsel or by a relative, friend or other spokesman. . . ." WAC 388-08-010, and under WAC 263-12-020 representation by lay advocates is permitted at hearings before the Washington Board of Industrial Insurance Appeals.[11]

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[10] In this regard, we deem relevant the fact that there is no requirement that hearing officers conducting such proceedings be attorneys. 34 C.F.R. 300.507.

[11] According to your own Office's regulations governing hearings conducted by educational agencies relating to the challenge of information in records, a parent or adult student "may be assisted or represented by individuals of his or her choice . . . including an

In light of the above, and because it is our understanding that the Washington Attorney General's Office has not issued a formal opinion on the matter, you may wish to share this analysis with that Office if you continue to have reservations about this Department's view of the role of lay advocates in EHA proceedings. We would be happy to provide any further assistance you may request, including our views on the means available to your agency to ensure that lay advocates are qualified to assist the parents of handicapped children, and to ensure that parent advocates observe reasonable rules of procedure in those proceedings.

Theodore Sky
Acting General Counsel

By: /s/ BARRY W. STEVENS
BARRY W. STEVENS
Acting Deputy General Counsel

cc: Mr. Ralph Julnes

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attorney." WAC 392-171-585(4). It would appear that lay advocates are permitted to represent parties at such hearings.